

No. 44777-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL HARRIS EHAT,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 12-1-03982-0  
The Honorable James Orlando, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. Michael Ehat was denied his right to effective assistance of counsel when his trial attorney failed to move to suppress evidence of firearms found in his home.
2. Michael Ehat's convictions for possession of a firearm violate due process because he acted on the advice and direction of a government agent.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Was Michael Ehat's trial counsel ineffective for failing to move to suppress evidence found by Pierce County Sheriff's Deputies in Ehat's home after they failed to inform Ehat that he could refuse to allow them entry to his home? (Assignment of Error 1)
2. Do Michael Ehat's convictions for possession of a firearm violate due process when he was relying on the advice and direction of a Pierce County Sheriff's Deputy who told him to secure the firearms after their original owner was found dead? (Assignment of Error 2)

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The State charged Michael Harris Ehat with one count of

second degree assault while armed with a firearm (RCW 9A.36.021, 9.94A.530, .533), and two counts of second degree unlawful possession of a firearm (RCW 9.41.040). (CP 6-7) The jury found Ehat not guilty of assault but guilty of the two firearm possession charges. (RP 393-94; CP 44-46) The trial court imposed a standard range sentence of six months. (RP 403; CP 52, 55) This appeal timely follows. (CP 61)

#### B. SUBSTANTIVE FACTS

Michael Ehat lived in a single-wide, two bedroom trailer on his property in Roy, Washington. (RP 61, 85, 185, 186) In the summer of 2012, Richard Young began living with Ehat at the trailer. (RP 185, 186) In the afternoon of October 21, 2012, Pierce County Sheriff's Deputies responded to a 911 call from Young, who claimed that Ehat had pointed a shotgun at him and verbally threatened him. (RP 61-62, 63, 120) The deputies who responded found Young standing in the neighbor's driveway, and noted that Young was angry and agitated. (RP 62-63, 99-100)

Because the Deputies were concerned about the presence of a firearm, they placed a phone call to Ehat, who was still inside his trailer, and asked him to step outside. (RP 124, 125) Ehat complied, and was calm and cooperative as he interacted with the Deputies.

(RP 64, 81-82, 92, 125) Ehat acknowledged that there were firearms inside the trailer, and he agreed to show the Deputies where they were located. (RP 66, 126, 163) Ehat lead the Deputies into the trailer and to one of the bedrooms. (RP 66, 85, 186) The door to the bedroom was closed, but once inside the bedroom, the Deputies noticed that the room appeared to be used primarily for storage of boxes and other items. (RP 66, 71, 87, 103)

Ehat showed the Deputies a .22 caliber rifle. (RP 66, 94) Ehat seemed confused, however, because a shotgun he thought was stored in the bedroom was missing. (RP 67, 94, 110) He did not know where the shotgun was, and thought perhaps Young had taken it. (RP 94, 95-96, 129, 94-95)

Ehat told the Deputies that he obtained the firearms after his brother's recent death by suicide. (RP 66, 127) Ehat also said that he was not permitted to possess firearms,<sup>1</sup> but after his brother's death Pierce County Deputy Gary Sanders instructed him to secure the firearms. (RP 66-67, 69, 90)

When the deputies were interviewing Young, he told them that Ehat kept the shotgun under the sofa in the living room. (RP 71, 95,

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<sup>1</sup> The State presented documentary and testimonial evidence showing that Ehat has a prior misdemeanor conviction of a type that renders him ineligible to possess a firearm. (Exhs. P1-P3; RP 262, 266-67)

164) The Deputies went to that location, pulled back the sofa from the wall, and found a shotgun. (RP 70, 95-96)

At trial, Young testified that he had been living with Ehat and had been paying all of Ehat's bills and also loaned him money. (RP 185, 186, 196-97) According to Young, Ehat had significant emotional problems, was always drinking alcohol and smoking marijuana, and that Young was Ehat's only friend. (RP 188-89, 207) Young testified that Ehat has guns hidden all over the trailer, and that he himself had a gun hidden in an armchair. (RP 191, 192, 213) Young claimed that Ehat kept the shotgun hidden behind the couch. (RP 192)

According to Young, he and Ehat had a disagreement on the evening of October 20, 2012, and Young told Ehat that he was going to move out. (RP 188-89) According to Young, Ehat approached him the next morning, pointed a shotgun at his face, discharged one round onto the floor, and verbally threatened him. (RP 189, 199)

Young testified that he was able to wrestle the shotgun away from Ehat. (RP 190) Young threw the shotgun against the wall, and it fell neatly behind the sofa. (RP 190, 209, 211-12) Then Young ran outside and called 911. (RP 190)

The responding Deputies testified that they did not notice any



evidence of drug or alcohol use when they were inside Ehat's trailer, and that Ehat did not show any signs of being under the influence of drugs or alcohol. (RP 82-83)

In the months that followed, while Ehat was in custody and awaiting trial, Young continued to live rent-free in Ehat's trailer, which still contained Ehat's furniture and personal property. (RP 200, 202-0, 214-15) In that time, though, many of Ehat's personal belongings have mysteriously gone missing. (RP 215) But Young did confirm that a Pierce County Deputy told Ehat to secure his brother's firearms. (RP 191, 195)

Deputy Gary Sanders testified that he investigated the death of Ehat's brother in August of 2012, and that he did ask Ehat to secure the firearms. (RP 281, 282) But he meant that Ehat should secure the entire home to prevent the belongings inside from being stolen. (RP 282, 283) Deputy Sanders does not remember his exact words, but he testified he would not have told Ehat to take the firearms to another location. (RP 286, 287) However, the front door of Ehat's brother's home had been kicked in to allow investigating officers access to the home. (RP 287)

#### **IV. ARGUMENT & AUTHORITIES**

A. EHAT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO MOVE TO SUPPRESS THE FIREARMS FOUND IN HIS HOME BECAUSE THE DEPUTIES DID NOT ADVISE EHAT THAT HE HAD THE RIGHT TO REFUSE CONSENT TO THEIR SEARCH OF THE HOME.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the

outcome of the case.” Strickland, 466 U.S. at 693.

Both prongs of the Strickland test are met here because Ehat can show that counsel should have brought a CrR 3.6 motion to suppress the firearms, and this failure was prejudicial.

First, a CrR 3.6 motion to suppress the firearms on the grounds that the entry or search of Ehat’s trailer was improper would have been successful. Article I, section 7 of the Washington Constitution, provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The right to privacy includes the right to be free from warrantless searches, which are “unreasonable per se.” State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Consent is one of the narrow exceptions to the search warrant requirement, and the State bears the burden of establishing the exception. Hendrickson 129 Wn.2d at 71.

When police officers request permission to enter a citizen’s home to conduct a warrantless search they must, prior to entering the home, inform the person from whom consent is sought that he or she: (1) may lawfully refuse consent to the search; (2) may revoke, at any time, the consent that they give; and (3) may limit the scope of the consent to certain areas of the home. State v. Ferrier, 136

Wn.2d 103, 118-19, 960 P.2d 927 (1998). This rule applies when police seek entry to a home in order to conduct a warrantless search for contraband or evidence of a crime. State v. Khounvichai, 149 Wn.2d 557, 566, 69 P.3d 862 (2003) (citing State v. Williams, 142 Wn.2d 17, 27-28, 11 P.3d 714 (2000)). The failure to provide these warnings prior to entering the home vitiates any consent given thereafter. Ferrier, 136 Wn.2d at 118-19.

In this case, the Deputies testified that they called Ehat and asked him to come outside, and that Ehat complied. (RP 64, 124, 125) Ehat stepped down off of his porch, and was immediately handcuffed and patted down. (RP 29, 64, 125) The Deputies then advised Ehat of his Miranda warnings, and asked him whether there were firearms in his trailer. (RP 31, 65) When Ehat said that there were, the Deputies asked Ehat to “point them out[.]” (RP 32) Ehat “agreed to allow” the Deputies into the house, and he escorted the Deputies to the room where the firearms were kept. (RP 32, 43, 66, 126)

While Ehat may have “agreed to allow” the Deputies into the trailer, Ehat was not advised that he was not obligated to allow the Deputies to enter the trailer to locate and collect the firearms. Ehat’s consent was therefore not fully voluntary because he was not

advised that he could refuse consent. Accordingly, if trial counsel had brought a motion to suppress on these grounds, the motion would have been successful. Failure to do so fell below objective standards of reasonable representation.

There is a strong presumption that defense counsel's conduct is not deficient. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

If trial counsel had brought a CrR 3.6 motion to suppress it would have been granted, and the evidence of the firearms would have been suppressed. Without evidence of the firearms, the State would not have been able to prove the two unlawful possession of a firearm charges. Because of the obvious prejudice to Ehat, there was no conceivable legitimate tactic explaining why counsel would not seek to have the firearms suppressed.<sup>2</sup>

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<sup>2</sup> See State v. Reichenbach, 153 Wn.2d 126, 137, 101 P.3d 80 (2004) ("Because the methamphetamine was illegally seized and there was no tactical reason for failing to move to suppress, counsel's deficient performance was clearly prejudicial. Reichenbach's conviction for possession of methamphetamine was [dependent] on the baggie that was seized. Without that evidence, the State could not prove possession beyond a reasonable doubt. Reichenbach's right to the effective assistance of counsel was violated.")

Ehat has met his burden of showing both deficient representation and prejudice. Ehat's convictions should be reversed and his case remanded for a new trial with adequate representation.

B. EHAT'S CONVICTIONS FOR POSSESSION OF A FIREARM VIOLATE DUE PROCESS BECAUSE EHAT WAS ACTING AT THE ADVICE AND DIRECTION OF DEPUTY SANDERS.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvane, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

A person is guilty of unlawfully possessing a firearm in the second degree if the person owns, possesses, or controls a firearm after having been convicted of certain domestic violence offenses. RCW 9.41.040(2)(a)(i). However, it is a defense to the charge if the defendant can show that he was affirmatively misled into committing

the crime by representations of a government actor. See State v. Locati, 111 Wn. App. 222, 227, 43 P.3d 1288 (2002). A criminal defendant relying on this defense must show that his or her reliance on misleading information provided by the government was objectively reasonable under the particular circumstances of the case. Locati, 111 Wn. App. at 227.

In this case, upon Ehat's request, the jury was instructed as follows:

It is a defense to the charges of Unlawful Possession of a Firearm Second degree, as charged in Counts II and III, if you find that the defendant believed he was acting out of a good faith reliance on the apparent authority of another to authorize his actions as long as his reliance was objectively reasonable.  
The defendant has the burden of proving this defense by a preponderance of the evidence.

(CP 12, 38)

Factors to consider in the reasonableness determination include the authority of the source providing the misleading information and whether the defendant received inconsistent information from the same or a different source. Locati, 111 Wn. App. at 227, and see, e.g., State v. Leavitt, 107 Wn. App. 361, 371-73, 27 P.3d 622 (2001) (sentencing court failing to inform defendant of firearm prohibition); Cox v. State of Louisiana, 379 U.S. 559, 57-

71, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965) (police chief, in presence of sheriff and mayor, misleading defendant as to permitted area of demonstration); United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir.1987) (defendant's reliance on misinformation from federally licensed gun dealer reasonable in light of defendant's attorney's mistaken opinion as to legality of gun possession); United States v. Barker, 546 F.2d 940, 949-50 (D.C.Cir.1976). (White House operative acting under apparent presidential authority); United States v. Lansing, 424 F.2d 225, 227 (9th Cir.1970) (correspondence and forms from draft board).

A review of the uncontested evidence in this case shows that Ehat's possession of the firearms was prompted by a good faith reliance on Deputy Sanders' instructions to secure the firearms after Ehat's brother's death.

Ehat told the Deputies who responded to Young's call that he brought the firearms to his trailer because Deputy Sanders instructed him to secure the firearms. (RP 66-67, 69, 90) Young also testified that Ehat was told to secure the firearms. (RP 195) Deputy Sanders agreed that he had told Ehat to secure the firearms, although he explained to the jury that he meant that Ehat should secure them inside the brother's home. (RP 283) However, a reasonable person



in Ehat's position, faced with an unexpected death of a brother and an inability to secure the brother's home because Deputies had kicked the door down to gain entry (CP 281, 287), would have believed that he was being asked to take the firearms to a secure location. And that is what Ehat tried to do.

Where government officials have misled the defendant into believing that his conduct was not prohibited, a criminal statute cannot constitutionally be applied to that defendant without violating due process of law. See Leavitt, 107 Wn. App. at 371-72, and authorities cited therein). Thus, conviction under the circumstances in this case violates Ehat's due process rights because he acted upon Deputy Sanders' direction to secure the firearms.

## **V. CONCLUSION**

Michael Ehat was denied his right to effective assistance of counsel when his trial attorney failed to move to suppress evidence that was collected as a result of an obviously improper search, and without which the State could not prove its case. Ehat also proved by a preponderance of the evidence that he acted at the direction of a governmental official, and therefore his convictions for unlawful possession of a firearm violate due process. Both of these errors require that Ehat's convictions be reversed.

DATED: September 9, 2013

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Michael Harris Ehat

**CERTIFICATE OF MAILING**

I certify that on 09/09/13, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael H. Ehat, 2902 381<sup>st</sup> Street S, Roy, WA 98580.

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

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